



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: TMC, Inc. -- Claim for Costs
File: B-230078.2; B-230079.2
Date: January 26, 1990

DIGEST

1. Protester awarded costs in connection with successful protest is entitled to reimbursement for proposal preparation and protest costs incurred or initially paid by prospective subcontractor, where the costs were incurred by the subcontractor acting in concert with and on behalf of offeror and offeror has agreed to reimburse to subcontractor the amount ultimately recovered from the government.
2. Where claim for costs of proposal preparation and of filing and pursuing protests is not adequately documented, claimant is not entitled to recovery.

DECISION

TMC, Inc., requests that the General Accounting Office (GAO) determine the amount it is entitled to recover from the United States Department of Agriculture (USDA) for proposal preparation costs and the costs of filing and pursuing its protest under request for proposals (RFP) Nos. 1-M-APHIS-88 and 2-M-APHIS-88, issued by USDA for the acquisition of inactive dried yeast.

We determine, as discussed below, that TMC is entitled to recover \$19,102.09 for its cost of proposal preparation and filing and pursuing its protest.

BACKGROUND

In TMC, Inc., B-230078, B-230079, May 24, 1988, 88-1 CPD ¶ 492, we sustained TMC's protest against award to another offeror and found it entitled to recover the costs of preparing its proposal and of filing and pursuing the protest, including attorneys' fees. In the claim submitted to the USDA, TMC claimed costs paid or incurred by TMC's selected subcontractor, the Lake States Yeast Division of Rhineland Paper Company (Lake States), as well as costs

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that were paid or incurred by TMC. Specifically, TMC stated that the proposal preparation costs consisted of TMC's costs for direct labor and telephone calls, amounting to \$735.00, and Lake States' costs for product samples, freight, and special sample preparation, amounting to \$2,029.86. TMC stated that the protest costs consisted of TMC's costs for direct labor, travel expenses, telephone calls, office supplies, and postage, amounting to \$2,259.00, and Lake States' costs for direct labor, travel expenses and attorneys' fees, amounting to \$18,542.73. The total costs claimed by TMC amounted to \$23,566.59.

USDA determined that only the portion of the claimed costs paid by TMC were allowable, that is, \$2,994, and that the remainder of the claim, \$20,572.59, should be disallowed. It is USDA's position that the remainder of the claimed costs are not properly due TMC since they were incurred and paid, not by TMC, but by Lake States. Since Lake States, as a subcontractor, and not a prospective offeror, lacked standing to protest, USDA believes TMC is unable to recover the costs Lake States incurred in connection with the procurement and protest.

ARGUMENTS

TMC maintains it should be permitted to recover all of its and Lake States' costs incurred in connection with proposal preparation and pursuing the protest. In this regard, TMC explains it had a long-standing "teaming arrangement" with Lake States, pursuant to which TMC and Lake States shared the responsibility for submitting offers and filing and pursuing protests. TMC was responsible for preparing and submitting bids, while Lake States was responsible for preparing and submitting yeast samples and any required technical information, and each party initially bore the expense of performing its respective role. Although TMC alone signed the offers, it indicated in its proposals that the contracts would be performed at Lake States' facilities. Likewise, while the protest was brought in the name of TMC, both firms appeared at a bid protest conference and, according to TMC, both participated in developing protest arguments. TMC states that while each firm bore its own costs, "Lake States agreed to reimburse TMC its attorneys' fees to the extent they were not recovered from USDA, and in fact Lake States paid those fees directly."

ANALYSIS

We find that the protest costs and proposal preparation costs incurred by Lake States generally are recoverable by TMC under this claim.

Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. 3554(c)(1) (Supp. V 1987), where our Office determines that the award of a contract does not comply with statute or regulation, we may declare "an appropriate interested party" to be entitled to the costs of filing and pursuing the protest, including reasonable attorneys' fees, and of bid and proposal preparation. Our Bid Protest Regulations define "interested party" for the purpose of filing a protest as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 4 C.F.R. §§ 21.0(a) and 21.6(d) (1989). We have recognized that the recovery of protest costs is allowed in order to relieve parties with valid claims of the burden of vindicating the public interests which Congress seeks to promote. See Hydro Research Science, Inc.--Claim for Costs, B-228501.3, June 19, 1989, 89-1 CPD ¶ 572.

Protest Costs

Here, clearly documented costs were in fact incurred in pursuit of a meritorious protest against an improper award. Although most of these costs were paid by Lake States, the proposed subcontractor (and as such not an interested party eligible under our Bid Protest Regulations to protest in its own right, Nasatka Barrier, Inc., B-234371, B-234378, Mar. 31, 1989, 89-1 CPD ¶ 349), this is not a case where the costs were incurred by a potential subcontractor acting independently of the interested party, TMC, the actual or prospective offeror. Rather, we find the record supports TMC's position that the costs were incurred by Lake States acting in concert with and on behalf of TMC in order to provide TMC with legal representation and technical assistance in the development of its protest arguments. Furthermore, the record indicates that TMC has agreed to reimburse Great Lakes the costs it incurred in pursuit of TMC's protest when TMC recovers payment from the government; thus, this is not a case where TMC might become unjustly enriched by recovering costs it did not incur.

In these circumstances, we believe the purpose of the statutory provision allowing recovery of protest costs--to relieve parties with valid claims of the burden of vindicating the public interest--is best effectuated by finding TMC entitled to recover those protest costs incurred or initially paid by Lake States in concert with and on behalf of TMC.

Proposal Preparation

While we generally would not view the costs incurred by a mere potential subcontractor in preparing a quotation to be recoverable by a successful protester as part of its proposal preparation costs, this is not the situation here. Just as we found that TMC and Lake States acted in concert in pursuing the protest, the record establishes that Lake States' relationship with TMC was more than that of only a potential subcontractor. In this regard, Lake States did not merely provide TMC with a quotation for certain work under the solicitations, but rather participated fully in the proposal process by submitting the required samples to the agency on behalf of TMC (indeed, it is the costs associated with these samples that comprise Lake States' portion of the claimed proposal preparation costs). In addition, TMC in its proposals designated Lake States' facility as the place of performance, and the agency advises us that TMC has previously acted as Lake States' dealer, supplying the government with Lake States products, and that it understood TMC to be offering Lake States yeast here. In these circumstances, we view Lake States' proposal preparation costs to have been incurred as part of a joint effort with TMC, and thus as recoverable by TMC under this claim.

LACK OF DOCUMENTATION

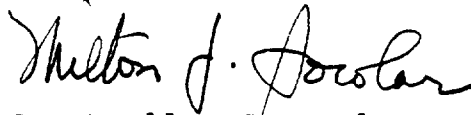
We find, however, that TMC has not established its entitlement to recover certain of the costs claimed to have been incurred by it and Lake States. Notwithstanding the agency's request to TMC for documentation of Lake States' claimed costs for direct labor (\$1,470.50 for 50 hours of labor) by a Lake States employee in pursuing the protest, we note that TMC has provided no documentation in support of its claim in this regard. Likewise, although the USDA does not challenge TMC's claim of \$2,994 as the costs TMC itself incurred in preparing its proposals and pursuing the protest, we note that TMC also has provided no documentation in support of this aspect of its claim. Notwithstanding the agency's initial request to TMC for an "itemized account" of its costs and the agency's subsequent requests for documentation of TMC's claimed costs for direct labor (\$2,600 for 52 hours of labor by a TMC vice president), and telephone calls (\$143), TMC has failed to provide any evidence to establish the amounts claimed, for what specific purposes these claimed expenses were incurred, or how they relate to the protests. It appears to be TMC's position that either supporting documents "do not exist" or, in the case of telephone expenses, are "not readily available."

The burden is on the protester to submit sufficient evidence to support its claim, and that burden is not met by unsupported statements that the costs have been incurred. Hydro Research Science, Inc.--Claim for Costs, B-228501.3, supra. Although we recognize that the requirement for documentation may sometimes entail certain practical difficulties, we do not consider it unreasonable to require a protester to document in some detail the amount and purposes of the claimed effort by a senior employee; to establish that the claimed hourly rate reflects the employee's usual rate of compensation plus reasonable overhead and fringe benefits, see generally Ultraviolet Purification Sys., Inc.--Claim for Bid Protest Costs, B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376; or to provide such customary and usual business records as telephone bills, hotel bills, credit card receipts, and canceled checks. Although we recognize that TMC necessarily incurred some costs in preparing its proposals and pursuing its protest, we do not think that a protester's recovery of such costs should be based on speculation by our Office as to the reasonableness of the claim. See generally Patio Pools of Sierra Vista, Inc.--Claim for Costs, 68 Comp. Gen. 383 (1989), 89-1 CPD ¶ 374.

Based on the foregoing, \$1,470.50 of Lake States' protest costs, as well as TMC's claimed \$2,259 in protest costs and \$735 in proposal preparation costs, have not been established on the record before us, and thus are disallowed. To the extent documentation establishing its own claimed costs becomes available, it should be presented to USDA for its consideration.

CONCLUSION

TMC's claim thus is allowed in the amount of \$19,102.09 (\$18,542.73 in protest costs, \$559.36 in proposal preparation costs).

for 
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